No. 86-1702

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED DAIRYMEN OF ARIZONA, *et al.*,
Petitioners,

v.

JEROME LASALVIA AND PEGGY LASALVIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that disputed issues of material fact concerning petitioners' refusals to deal and monopolization of the production and sale of milk within the Central Arizona Milk Marketing Area required a remand for trial.

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Respondents, Jerome and Peggy LaSalvia, hereby oppose the petition for a writ of certiorari filed in this case.

STATEMENT

1. Respondents operate an independent dairy farm in Laveen, Arizona, which is located within the Central Arizona Milk Marketing Area. 7 C.F.R. § 1131.2. Petitioner United Dairymen of Arizona ("UDA") is an agricultural cooperative made up of dairy farmers operating in the same milk marketing area where respondents do busi-

ness.[1] UDA operates a plant for the manufacture of cheese and powdered milk from Grade A raw milk.[2] In part because UDA maintained the only manufacturing facilities for converting raw milk into cheese or powdered milk and, in part, because of its coercive business practices, UDA achieved market dominance in the central Arizona milk marketing area. From 1975 to 1980, UDA's share of the relevant market (the production of milk and milk products within the geographic area covered by Order 131) increased from just under 85 percent to almost 89 percent. C.R. 449, Exhibit 23. As a consequence, respondents constituted petitioners' only significant competition within the milk marketing area.

From 1975 to 1981, despite having available capacity at its manufacturing plant, which was the only such plant within the milk marketing area, petitioner UDA refused to accept respondents' milk for processing. Indeed, during that period, UDA imported milk from outside of Arizona for use in its milk manufacturing plant.

During 1974 and 1975, petitioners refused to accept respondents' milk. Pet. App. A20. Petitioner Girard told one of the respondents in 1975 that he would not accept respondents' milk but that he "would check it out and if something changed . . . would let [respondents] know

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[1] The other two petitioners, Robert Girard and Leonard Cheatham, were the general manager and president of petitioner UDA respectively during the period relevant to the issues raised in the petition. Pet. App. A1-A2.

[2] The pricing and handling of Grade A raw milk are governed generally by the Agricultural Adjustment Act, 7 U.S.C. § 601 *et seq.* The regulations governing milk in the Central Arizona Milk Marketing Area are set forth in 7 C.F.R. part 1131 and are collectively referred to as "Order 131." The order establishes three classes of milk: Class I is milk used for consumption; Class II is milk used for soft dairy products, such as yogurt and Class III is milk used for powdered milk and cheese.

that [h]e'd take [their] milk." C.R. 329, Exhibit 46. Again in 1977 and 1978, respondents, through one of their attorneys, inquired whether UDA would then accept respondents' milk, but he was informed that UDA would not. C.R. 449, Exhibit 42.

2. On April 2, 1980, respondents filed the instant lawsuit against petitioners in the United States District Court for the District of Arizona, alleging that petitioners had engaged in various predatory practices in an attempt to monopolize the production and marketing of Grade A raw milk in central Arizona in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, and that petitioners had restrained trade by engaging in various unilateral and concerted refusals to deal in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Respondents alleged that, as a consequence of those antitrust violations, they had been unable to sell substantial quantities of their milk in the relevant market at the Milk Marketing Order 131 price.

Specifically, respondents challenged six practices: 1) petitioners' coercive use of full supply contracts with handlers (packagers) who purchase petitioners' milk, which precluded handlers from purchasing respondents' milk; 2) a unilateral boycott involving petitioners' refusal to purchase respondents' milk for processing at its manufacturing facility until 1981, when petitioners purchased some of respondents' milk but only at a price less than the Order 131 price to which respondents were entitled; 3) petitioners' use of secret rebates to its handlers; 4) petitioners' use of overly restrictive covenants not to compete entered into with UDA's members; 5) petitioners' agreements with out-of-state cooperatives which eliminated those cooperatives as available purchasers of respondents' milk and 6) petitioners' acquisition of control of the means to transport raw milk. Pet. App. A2-A3.

The district court entered summary judgment for petitioners. Pet. App. A14-A27. The court first held in a separate order that respondents lacked standing to litigate their monopolization allegations concerning the use of restrictive covenants not to compete, the use of secret rebates to handlers and petitioners' acquisition of key transportation facilities. *Id.* at A3. Subsequently, the court held that the causes of action based on the remaining allegations were barred by the four-year statute of limitations in the Clayton Act, 15 U.S.C. § 15b. The district court held that respondents knew that petitioners' refusal to deal was unequivocal by at least 1975 and that under the law of the Ninth Circuit,[3] petitioners' refusal began the running of the statute of limitations and nothing subsequent to that time gave rise to a new cause of action which would have extended the period for filing suit.[4] Pet. App. A23-A25.

The court of appeals reversed unanimously and remanded the case for trial. Pet. App. A1-A13. The court first held that respondents could properly challenge petitioners' restrictive covenants, secret rebates and acquisition of transportation facilities because these "were employed in an unlawful quest for market dominance" which caused harm to respondents of "the sort that the antitrust

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[3] *See, e.g., David Orgell, Inc.* v. *Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.), cert. denied, 454 U.S. 816 (1981); *Steiner* v. *20th Century Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956).

[4] The district court also denied respondents' motion to amend their complaint to include allegations that when petitioners began to accept respondents' milk in 1981, petitioners refused to pay the required Order 131 minimum price and that this action was in furtherance of petitioners' monopolistic practices. Pet. App. A26. The court denied the request because 1) respondent knew of these practices for three years; 2) the allegations were a "disguised" challenge to petitioners' restrictive covenants and 3) the discovery period had ended. Pet. App. A26.

laws were intended to remedy." *Id.* at A5. Second, the court held that summary judgment was unwarranted with respect to the refusal to process respondents' milk because the initial refusal was, according to petitioner Girard's own account, "ambiguous." *Id.* at A8. In reversing, the court of appeals reaffirmed the general principle that a final refusal begins the running of the statute of limitations and that subsequent reaffirmations of the earlier refusal do not extend the limitations period, but held that on the record *in this case* that rule did not apply. In addition, the court noted that even if petitioners' refusal had been "final," that would not have justified dismissal of the claims based on petitioner UDA's "exploitation of its market position," which involved both injury to respondents and actions by petitioners during the four years prior to the filing of the complaint in this case.

Finally, the court of appeals held that petitioners' concerted refusal to deal constituted a continuing violation within the meaning of this Court's decision in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). The court of appeals recognized that respondents' injuries did not arise solely out of petitioners' refusal to deal, but also because petitioner "UDA had used its market position to impose contracts on handlers within the [Central Arizona Milk Marketing Area] that prohibited them from dealing with [respondents]." Pet. App. A11.[5]

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[5] In so holding the court pointed out that respondents could only recover for damages actually incurred during the four-year period prior to the filing of the complaint. Pet. App. A12. The court of appeals also reversed the district court's refusal to permit respondents to amend their complaint. The court of appeals held that the amendment would cause petitioners no prejudice because the discovery concerning post-complaint injuries would be minimal and the issues were not new to the case. Pet. App. A12-A13.

ARGUMENT

The decision of the court of appeals is a correct application of settled principles of law to the specific facts of this case. Indeed, the decision below does not even finally resolve this case; the court merely remanded for a trial on respondents' claims. Accordingly, review by this Court at this time is wholly unwarranted.

1. Petitioners contend (Pet. 10-16) that the court of appeals erred in refusing to respect the district court's determination that petitioner UDA's refusal to deal was finally effected in 1975 and therefore respondents' lawsuit which was filed in 1980 is barred by the four-year statute of limitations. In the first place, review of this contention is unwarranted because it is inherently fact-bound; any decision on this issue would affect no one except petitioners and respondents. Second, the contention is predicated on a mischaracterization of "[t]he basis of respondents' antitrust action." Pet. 10. Petitioners analyze the case without the monopolization claims which the court of appeals reinstated. When the district court dismissed the lawsuit on statute of limitations grounds, it had already improperly dismissed for lack of standing respondents' challenge to a wide variety of anticompetitive practices.[6] Petitioners completely ignore the Ninth Circuit's reversal of that holding. Thus, even if deference were owed to a district court's determination to grant summary judgment, which is a novel proposition for which petitioners offer no case authority, none would be warranted here where the record before

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[6] Petitioners have presented no question concerning the portion of the court of appeals' decision which reinstated the evidence concerning the UDA's use of restrictive covenants, rebates to purchasers and the acquisition of milk transportation facilities. The court of appeals held that the district court's error on these issues, by itself, required reversal of the entry of summary judgment. Pet. App. A6. Thus, even if the Court granted the petition, it could not finally resolve this case.

the court of appeals and that before the district court were significantly different. Finally, even if the finality of petitioners' refusal to deal in 1975 were the sole issue in this case, which it is not, the court of appeals was clearly correct in holding that the evidence on that issue, which is obviously a material issue, was in dispute. First, petitioner Girard's testimony supports respondents' position; second, there was evidence of subsequent requests by respondents' attorneys which evidenced their understanding that the 1975 denial was not final, see page 3 *supra*; third, the fact that petitioners subsequently accepted respondents' milk demonstrates clearly that the 1975 refusal was not "immutable, final or irrevocable."

There is thus no conflict between the decision below and *Garelick* v. *Goerlich's, Inc.*, 323 F.2d 854 (6th Cir. 1963), relied upon by petitioners (Pet. 15). Both the Ninth and Sixth Circuits apply the same rule—a final refusal to deal begins the statute of limitations and mere subsequent refusals do not create new causes of action which would extend the limitations period. See *Pace Industries, Inc.* v. *Three Phoenix Co.*, No. 85-1754 (9th Cir. Mar. 24, 1987), slip op. 11 (applying finality standard to bar lawsuit on limitations ground); *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68 (9th Cir.), cert. denied, 444 U.S. 900 (1979); *Hennegan* v. *Pacifico Creative Service, Inc.*, 787 F.2d 1299 (9th Cir.), cert. denied, 107 S.Ct. 279 (1986). Nothing in *Garelick* suggests that an equivocal refusal such as petitioners' begins the running of the limitations period, when, as here, subsequent acts do more than reaffirm the prior action and cause new and accumulating injury to the plaintiff. See *Pace Industries, Inc.* v. *Three Phoenix Co.*, *supra*, slip op. 10.[7] Thus, petitioners' claim is nothing more than a

[7] Nor is there any inherent contradiction in the court of appeals' analysis of the record. Simply because respondents can testify in 1983 that petitioners refused to deal with them does not mean that

disagreement with the court of appeals over whether on this record there was a disputed issue of material fact.

2. Petitioners argue (Pet. 16-22) that the court of appeals also erred in holding that the complaint stated a continuing violation of the antitrust laws which extends the limitations period for filing a complaint.[8] The fundamental flaw in petitioners' contention is their refusal to deal with respondents' theory of the case as reflected in the court of appeals' decision. The court of appeals correctly interpreted respondents' complaint as properly stating a cause of action for monopolization based on a variety of predatory practices, including but not limited to petitioners' refusal to accept respondents' milk for processing. Petitioners repeatedly argue (Pet. 16, 19, 21) that the final "overt act" occurred in 1975 when they rejected respondents' request. But this ignores the holding below that "plaintiffs claim harm from UDA's exploitation of its market position" as part of a monopolization effort. Pet. App. A10. The court of appeals could not have been plainer on this issue: "The losses claimed in [respondents'] damage analysis stem not from the initial refusal, but from the unlawful monopolization of the market at issue." *Ibid.* The prac-

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they understood that to be petitioners' position in 1975. The evidence of subsequent contacts by respondents' counsel concerning processing of respondents' milk during 1976 and 1977 is certainly strong evidence that respondents did not understand the 1975 refusal to be the final word even had subsequent events revealed that petitioners did not intend to deal with respondents as part of a scheme to monopolize milk production and distribution. In fact, petitioners did eventually accept respondents' milk, albeit at a discriminatory price.

[8] This issue is clearly not ripe for review by this Court. The court of appeals merely indicated that on remand the source of respondents' damages should be an issue separate from the refusal-to-deal claim and that it was possible that respondents could prove a continuing violation. Pet. App. A10. The parties have not had an opportunity to develop the record on this issue yet and thus consideration of the issue now by this Court would be premature.

tice that caused these injuries extended well beyond 1975 and, in fact, respondents properly amended their complaint to allege that such practices continued well after the original complaint was filed in this case.[9] Under respondents' broader theory, which is not challenged in the petition, the decision below, remanding so that the parties could be afforded an opportunity to "address the source and timing of the damage question" (Pet. App. A10), was clearly appropriate and raises no issue warranting review by this Court.[10]

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[9] Petitioners have not challenged the ruling that the district court erroneously refused to allow respondents to amend their complaint to assert overt predatory acts which caused new harm during the pendency of the lawsuit.

[10] Only by assuming that this case involves no more than a refusal to deal can petitioners argue that *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 418, 502 n.15 (1968), has been misapplied. The court below did not hold that a single refusal to deal could ever constitute a "continuing violation"; it held that petitioners' "damaging contracts" inflicted continuing harm upon respondents which extended the limitations period. Pet. App. A11. This application of the continuing violation theory is unexceptionable. Compare *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to review the judgment of the court of appeals in this case should be denied.

Respectfully submitted,

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